Judicial Settlement

OF INTERNATIONAL DISPUTES

No. 17

JUSTICE BETWEEN NATIONS

By

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The American Society for Judicial Settlement of International Disputes has been in active existence for four years. It has held annual conferences, published four volumes narrating its proceedings at these, and maintained a quarterly journal, of which the seventeenth number has now been reached.

Has it gained and deserved a place among the recognized agencies that are working for the betterment of the world?

We submit that it has.

That the happiness of the world would be advanced by the substitution of some better mode of proceeding than war for securing justice in the dealings of nations with each other, if such a better mode of proceeding can be found, no one will deny. Men may differ as to what in its nature such justice is. It may be that it differs in principle from justice between individuals. But, such as it is, all honest hearts must be one in the desire to promote it.

How, now, can we best ascertain its proper definition? Is it possible to frame one, as an abstract proposition, which will command universal acceptance? This will hardly be contended. It is denied by the whole history of

mankind. Justice between nations means one thing to one man and another to another; one thing to one people and another to another; one thing to one age and another to another. Mankind does not climb in the scale of intelligent existence on a ladder of general definitions. Definitions are an expression—and at best a partial expression—of the conclusions of many particular experiences.

What justice between nations, in respect to some new point of difference between any of them, demands cannot be determined without a historical review of what has been already practised in settling earlier international controversies. Custom makes law. Custom, in a sense, is law. Every determination of a dispute between nations, whether right or wrong, serves to prepare the way for a general definition of justice between nations as an abstract idea. If right, it leads straight to the logical theoretical result as a counsel of perfection. If wrong, it provokes criticism, leads to general discussion, and perhaps shows that the world is not yet ready to receive such counsel.

Who, then, shall make this historical review and draw the proper conclusions?

Surely, no one should be trusted to do it with final authority who is not specially fitted for the task. Surely, again, no one should be given such authority until resort has been had to every means of avoiding a decision not satisfactory to both of the parties to the difference.

The first means is that of diplomacy. Its greatest object is to prevent, or, if that cannot be, to compose international controversies. It is the product of modern civilization. During most of the life of the world one nation has sent

official representatives to another only on special occasions. There were no permanent embassies or legations and consulates. Since the close of the fifteenth century these have gradually become the rule as respects all considerable nations. It is due to the increasing complexity of international relations. The greater the intercourse between two countries, the greater is the need of some authority always at hand to expedite its development and smooth out the misunderstandings that will inevitably arise.

The first object of diplomacy or of consular establishments, then, is to prevent occasions of difference. The foreign consul hears a complaint by a merchant against some claim made under the customs laws of the government to which he is accredited, or intervenes in some dispute between a sailor on a vessel of his country and the port authorities. This is probably the end of it; but, if not, the resident ambassador or minister will take it up, and ordinarily with success. Ninety-nine out of a hundred of the questions which might become the cause of a serious international difference are thus quietly and peaceably disposed of by diplomatic negotiation.

In such settlements justice is often sacrificed. The weaker Power yields to the demands of the stronger one. A claim with no substantial merits is admitted as a matter of expediency, or perhaps of personal favor.

But the right to make settlements of this character is an important and beneficial one. It is almost as important that a controversy, whether between two men or two nations, should be determined promptly as that it should be determined justly. No real contribution to the advance-

ment of social progress would be made by facilitating a resort in such cases to an international court. This Society has no such object in view. The more frequently disputes are settled by voluntary agreement of the parties, the better will it be for human governments. Courts, national or international, must be kept as a last resort. One great object of the lawyer in every country is to discourage litigation by promoting amicable adjustments of disputes. One great object of the statesman is to promote such adjustments of international controversies.

But when, after all proper efforts, no adjustments can be thus reached, is it desirable to provide a court before which the nations can appear?

This must depend largely on the importance of the question in dispute, or of its prompt decision. If the dispute is over a matter of vital interest, before any reference to a court or to arbitration full opportunity should be given for interposing the good offices of some third Power, or in affairs of grave moment of several Powers acting jointly.

The momentous events of July, 1914, are a strong illustration of the expediency of such an offer of interposition, whenever there is any reasonable chance of its being kindly received.

The haste of Austria-Hungary in pressing her demands upon Servia is most easily accounted for by her unwillingness to listen to objections from other Powers. Nevertheless, if several of them had, at once, united in a formal offer of their good offices, it would have been far more difficult for her to come out before the eyes of the world and decline it than it was simply to withdraw the matter from a

diplomatic consultation proposed by one of the great Powers, and that a Power occupying a position not absolutely friendly.

We must take facts as they are. Europe is traversed by two ranges of associated nations. Each is a combination of three of the great Powers. On the east is that of Germany, Austria-Hungary and Italy. On the west is that of Russia, Great Britain and France. Between these ranges come a cluster of lesser Powers, whose policy is neutrality, and for part of whom neutrality has a certain European guarantee. The maintenance of peace with their greater neighbors has always been their great aim. They are no match for them. In the European concert, also, they can, in the nature of things, have no considerable share. A tender of good offices to Austria-Hungary and Servia, at the outbreak of their differences, by Belgium, or Holland, or Switzerland, would have been almost ridiculous. Had such a tender been jointly made by all the neutralized States of Europe, from Norway to Luxemburg, it would have been more imposing, though probably futile. But had such a tender been made by them in company with the two non-European great Powers—the United States, with its vast Asiatic interests, and Japan—it is not impossible that Austria-Hungary would have felt unable to decline it. Servia, of course, would have joyfully accepted such a tender from almost any quarter.

The whole incident shows that a great nation does not readily change a position which it has once definitely announced as respects a weak one.

Li Hung Chang wrote in his diary* in 1896: "There are always wolves where there are sheep. It is the same in the life of man and the lives of nations." But wolves are not to be found in a thickly settled country. They fly before civilization. They are the common enemies of the human race. Men protect sheep and kill wolves. So with the advance and spread of civilization and of international law may we expect the wolf among nations to recede and disappear. We may expect more. We may expect the great Powers of the world to be more slow to use their strength to carry in their favor a doubtful point of fact or right. We may expect that, should the present European war prove indecisive, and in another generation some fresh occasion arise for the outbreak, however passionate, of feelings of racial antagonism, there will be then some opportunity for judicial interposition, and for its proving effectual, because it voices the world-wide sentiment of that future time.

But, to return to what forces are now at the service of the public for preventing wars, a word more may properly be said as to the interposition for that purpose of friendly Powers.

A proffer of good offices is not a proffer of mediation. To accept one is not to indicate a willingness to accept the other.

The parties to any dispute look at it from different points of view. The familiar story which has come down to us from early times of the shield hung up on high with one side gilt and the other silver embodies a great truth. One

* Memoirs, 150.

of two knights who had approached it in different directions spoke of it to the other as a golden shield. The other was equally sure that it was silver, and their difference was finally fought out with sword and spear. Had a third person, familiar with the facts, because he had examined both sides of the shield, been there to intervene, the dispute would have been promptly settled.

The nation whose good offices are accepted by the parties to an international controversy is in a position to offer them the benefit of knowing how the matter looks to a disinterested observer, after hearing from both.

A Spanish proverb says that he who has heard but one side of a controversy has heard nothing. The sooner each of the parties to a dispute knows what facts are claimed by the other, and how these claims look to a third party desirous to bring it to a peaceful settlement, the better will be the chances of reaching such a conclusion.

If the diplomatic *pourparlers* fail of success, and if a tender of good offices is declined or proves fruitless, a third hope lies in mediation.

This also would often be preferable to an immediate effort to force a judicial settlement, even were there a well-organized court established to serve that purpose.

Mediation is in its nature facultative and not obligatory. But if an outside Power offers it, either with or after a tender of good offices, or if one of the parties to the controversy suggests it to the other and acceptance follows, there arises, in a certain sense, a moral duty to abide by

the course recommended by the mediator, if it be not obviously unfair and inadmissible.

Mérignhac, in his treatise on "Public International Law,"* states with clearness this distinction between good offices and mediation, as laid down by the leading authorities.

"The confusion," he observes, "between the two terms of *mediation* and *good offices* is wholly natural, for there are in the two pacific processes only two ways of occupying the same situation: it concerns, in both cases, a State which intervenes, whether by request or spontaneously, to bring about a pacific solution by its counsels and influence, without imposing its decision as in arbitration proceedings. Mediation, however, makes one step beyond good offices. Those express themselves by counsel, acts, negotiations having for their end to bring about peace, unaccompanied by any complete examination of the matter in dispute on the part of the State from which they emanate. The mediator, on the contrary, regularly participates in all negotiations down to their conclusion or rupture, or charges himself with the duty of examining the matter in dispute on the documents and proofs, and in making a determination as in the case of arbitration, but nevertheless without his decision's having an obligatory character."

It appears from the "white-book" issued early this month by the German government that prior to the general European war beginning in August, 1914, the Emperor joined Great Britain in "mediatory action" at the Court of Vienna as between Russia and Austria-Hungary, and that the Em-

* I, 434.

peror did this at the request of Russia. It is currently reported that there were other sincere efforts toward securing a diplomatic settlement put forth, at or before the same time, by several European Powers. Events, however, moved too quickly. From the day when Austria-Hungary formulated her grievances against Servia until war spread over most of Europe, there was no time given for any hopeful attempt at mediation.

Time is the great innovator. It is also the great pacifier. To secure time for a patient examination of points of dispute, with full opportunity for calm deliberation and reflection, is always to give some assurance of a just judgment.

For this purpose the United States has recently made treaties with twenty Powers, with provisions adequate to the purpose. Until there has been the lapse of a year, giving time for a full inquiry as to the merits of the controversy, there can be no war. The treaties in question are now pending before the Senate on a favorable report, and are between the United States and Salvador, Guatemala, Panama, Honduras, Nicaragua, the Netherlands, Bolivia, Portugal, Persia, Denmark, Switzerland, Costa Rica, the Dominican Republic, Venezuela, Italy, Norway, Peru, Argentina, Brazil and Chile. Like conventions negotiated with Great Britain and France have not yet been signed.

A similar result has been heretofore attained in several cases of importance by the aid of Commissions of Inquiry.

This is an appropriate mode of proceeding wherever there is a substantial difference of opinion as to a matter

of fact, the determination of which would naturally and properly govern the disposition of the controversy. It is also well adapted to disputes over a matter of mere punctilio.*

It is not a time-saving method of procedure, nor is it meant to be. One of its best features is that it cannot be pushed to a hasty conclusion. An opportunity is thus given for passions to cool and evidence to turn up.

It does not itself assume to adjudicate the rights of the parties. It pronounces on facts, not on the conclusions from them.

A Commission of Inquiry may, however, without forfeiting the right to its name, be given larger powers. The contending nations may refer to its decision the ascertainment of the facts and also the question of what action, if any, the facts make reasonably incumbent on either party. It then becomes in some sort a tribunal of arbitration.

The convention of 1904 between Great Britain and Russia, in relation to the Dogger bank incident, took this shape. Russia had fired on certain vessels. If they were enemy's ships, she was justified. If they were British fishing smacks, she was in fault and owed a pecuniary reparation. The Commission, should it find against her on the facts, was empowered to assess the damages and direct the payment. It did find against her, and did proceed to the final disposition of the controversy in the mode so authorized.

Commissions of Inquiry, as known to international law, are such only as are appointed by mutual agreement between both of the parties to a controversy.

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* See a fuller treatment of this subject by Dr. James Brown Scott in the Proceedings of this Society at its Fourth Annual Conference, in 1913, page 243.

A nation, uncertain whether it has or has not a cause of complaint against another, because the governing facts are unsettled, may endeavor to settle them with the aid of a Commission of Inquiry, appointed by itself. Here it is seeking only to inform its own conscience. The results of the inquiry would have no controlling weight with the other nation.

The *ex parte* commission created by President Cleveland to report on the boundary between British Guiana and Venezuela was an instance of such action.

Its work became unimportant in consequence of a treaty subsequently made between Great Britain and Venezuela, providing for the adjustment of this boundary by arbitration, under which it was finally settled in 1899.

In order of time, the natural course is, first, diplomatic negotiation confined to the parties to the controversy; second, *pourparlers,* in which there may be participation by the diplomatic representatives of other nations, with interests which might be affected by the controversy; third, benevolent interposition by a tender of good offices, or a request for them; fourth, commissions of inquiry; and fifth, arbitration.

Mediation is a work of diplomacy. It is its last effort; or rather its last effort, in the present condition of international law, is to arrange for a settlement by arbitration.

Arbitration may, of course, be proposed by one of the parties to the other at any previous stage of negotiation.

It has been found that arbitration is most likely to prove a just and final settlement when the arbitrators are men

not only of wide historical and legal acquirements, but of a judicial temperament. That they have this temperament is measurably to be presumed from their having previously occupied judicial positions in their own country. A suggestive address bearing on that point was given before this Society by William Renwick Riddell, of Toronto, at its Washington Conference, in 1913.*

In favoring a resort to arbitration, where diplomacy fails, the United States has an honorable record. It has been a party to eighty-three, including a few diplomatic settlements in the nature of arbitral adjustments. Awards have been made in these which aggregate over ninety million dollars.**

Part probably of the reason why the United States has resorted to arbitration so often is that diplomacy has not had with us the character of a scientific profession, which it sustains in Europe. We have had fewer men specially trained for and in it, and when we have had them we have not kept them as long in continuous service. Changes of political representation have involved too many changes of diplomatic representation.

This Society believes that the time is ripening for an advance from an international tribunal of arbitration to an international court of justice.

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* Proceedings of the Conference, 11. To the names of Judges mentioned by Mr. Justice Riddell who have acted in international arbitration should be added Alexander S. Johnson, of New York, whom he describes as one of the two arbitrators on the Hudson Bay claims, but not as having held a judicial position. He had, when chosen, in fact been a Judge of the New York Court of Appeals, and was afterward a United States Circuit Judge.

** Substantially three-fourths of this went to the United States and one-fourth came from the United States. *Arbitrations and Diplomatic Settlements of the United States,* Pamphlet No. 1, Carnegie Endowment for International Peace, 123.

In the instructions of the Department of State of the United States to its delegates to the proposed Panama Congress of 1826 is this passage:

"All notion is rejected of an amphictyonic council, invested with power finally to decide upon controversies between the American States, or to regulate in any respect their conduct."

In less than a hundred years an international congress of all the independent nations of America resolved that the principle of international arbitration was accepted as a Pan-American doctrine. Between 1826 and 1890 the peoples of America had become better acquainted with each other. Their institutions had become more similar. With the peaceful revolution in Brazil of 1889, governments republican in form had become universal. What was impossible in 1826 became a fair subject of consideration in 1890.

Reference has already been made to the fact that when Austria-Hungary, in July, 1914, undertook to discipline her little neighbor on the south, she was asked by one of the Great European Powers to meet the others in a diplomatic conference, with a view to endeavoring to avoid war. The reply, according to the echo of the talk of chancelleries which reaches the public ear through the international press organization, was that such a great nation as Austria-Hungary could not be expected to submit the propriety of her conduct in such an affair to the judgment of a European areopagus.

Must the world wait for the twenty-first century before Europe goes as far as America has done in advancing the

doctrine that there are other and better remedies than war for most international differences?

May not and should not the pending European war prove a step toward the erection of a real court of nations, to speak with authority and without partiality?

It is the common understanding that all the methods now existing for securing peace between nations at difference were tried before the war broke out, or at least before it became general, and were tried in vain.

At the outset Austria-Hungary had made diplomatic representations to Servia. Failing to agree with her, she had presented, on July 23, 1914, an ultimatum. It contemplated an inquiry into the existence and propagation in Servia of an unfriendly spirit toward Austria-Hungary, in making which Austria-Hungary was to participate. Servia refused to accept all the conditions required, and invoked the interposition of the Hague Tribunal of Arbitration. Never having ratified the convention under which it was erected, any claim of hers for that had perhaps been fatally delayed. Austria-Hungary then, on July 28, declared war upon her. Meanwhile there had been tenders of counsel to Austria-Hungary from various quarters, in the nature of an interposition for good offices. Until the day of the issue of her declaration of war negotiations of this character were proceeding in the Russian, Austrian and German Foreign Offices. Great Britain had also proposed a formal diplomatic conference. This plan had been rejected by Germany, though accepted by Italy on July 27. Germany had accompanied her refusal by a counter-proposal to the effect that Great Britain should concur in the endeavor to confine

any war that might result between Austria-Hungary and Servia strictly to the territory of those Powers, and let this result be worked out through pending diplomatic negotiations between St. Petersburg and Vienna, or representations to the government of Servia at its temporary seat at Nish. Next came the rupture between Germany and Russia and Germany and France; Germany's demands on Belgium; and finally a proposal from her to Great Britain, which the Prime Minister of that government styled as "infamous," on the floor of the House of Commons, on August 6. On August 4 the Emperor of Germany, in addressing the Reichstag, spoke of Russia as having given way "to an insatiable nationalism" by siding with Servia, "a State which, through a criminal act, had brought about the calamity of this war." He also alluded to the course of France as dictated by "malice."

When the men in power in the great nations which are now at war, after resort to all the methods of diplomacy, use such language in reference to sister States, it seems plain enough that the world has thus far provided no efficient way of avoiding offensive war, and so of avoiding defensive war.

It is also to be feared that the offer of good offices made by the United States on August 5, 1914, came too late to be of any avail at the present juncture.

Here, then, is a war very likely to cost the world ten thousand lives and ten million dollars for every day of its continuance. Diplomacy has done its best to circumscribe it or to stop it. It could not be circumscribed, it could not be stopped, unless by the friendly and firm interposition of

some high authority which the public opinion of the world could not but regard with respect.

Arbitrators could hardly now be selected from the Hague Tribunal, unless those selecting them looked first to their probable attitude toward the contending countries and the questions to be decided. Only a judicial court, the members of which had, before the war broke out, been chosen from those whose character and training gave assurance of intelligence and impartiality, could be confidently relied on as a final judge.

There are few controversies between nations which do not involve the determination of points of law. No tribunal for settling such controversies can be as effective as one whose members are familiar with the investigation of such points.

The justification for a great war may turn on a pure question of law, which can only be properly settled by an abstract definition framed by experts in judicial work.

Germany put forward the claim, as presenting a *casus belli,* that on August 3, 1914, France had violated the neutrality of Belgium by sending military airships to cruise over its territory. The soundness of this position (assuming the fact to be as thus claimed) must rest on the answer to the questions: first, whether a sovereign owns the air above his territorial possessions, and second, whether, however this may be, he is responsible for its police. Is the air, in other words, to be regarded as free, like the sea?

A court of justice could decide these points to the satisfaction of the world. No other authority can.

If such a court for nations as this Society proposes had existed in July, 1914, it is not utterly impossible that Bel-

gium might have instituted an action before it for an injunction against the flight over her territory of military air craft under authority of France, and obtained an early decision in her favor.

But one thing would have been necessary to the success of such a reference of such a point, and that is the support of the public opinion of the world.

Of course the functions of such a court could not and would not be confined absolutely to the decision of pure questions of law. In deciding those, it could not be wholly uninfluenced by the spirit of the civilization of the day. But that spirit, that *Zeitgeist,* might contribute directly, and even avowedly, to the reasons of a judgment upon controversies of other kinds. A judgment is a moral proceeding. It must accord with accepted moral standards. The most thoughtful defenders of the recent declarations of war in Europe are now appealing to these standards as a justification. Professor Münsterberg of Harvard University, for instance, after saying that they were the necessary outcome of a great conflict of civilizations, that is, of Slavic and Germanic culture, continues thus:

"If this war means such an inevitable conflict of the Slavic and the Germanic world, at least it ought to be clear to everyone who can think historically that it belongs to the type of war for which the world as yet knows no substitute, the one type of war which in spite of the terrible losses is ultimately moral. Surely no comment on this fight of the nations is more absurd than the frivolous cry that this is an immoral war. Every war for commercial ends or for personal glory or for mere aggrandizement or for revenge

may be called immoral, and thus the feelings with which Frenchmen and Englishmen join the Slavic forces might justly be accused. But both Slavs and Germans stand here on moral ground, as both are willing to sacrifice labor and life for the conservation of their national culture and very existence. Since the days of Napoleon Germany has never gone into a war which was more justified by the conscience of history."

Whether such appeals to morality, as a foundation of judgment on current events, be well or ill-founded, that they are made is no small proof of the force that moral sentiment has in the decision of public questions. It is what, at bottom, more than any other thing, moves the peoples of the modern world.

In war and in peace, in all public concerns, public opinion, be it right or wrong, is king.

Dr. von Bethmann-Hollweg, the Imperial Chancellor of Germany, in discussing before the Reichstag, on March 30, 1911, the proposal to limit naval armaments by international agreements, said that it was visionary, because public opinion might at any time force a war for which the Government would be unprepared. "The time," he said, "when wars were made by Cabinets is passed. The feelings which here in Europe may lead to war lie elsewhere. They have their roots in antagonisms which must be found in popular sentiment. Everybody knows how easily this sentiment is influenced and how, unfortunately, in many cases it abandons itself helplessly to irresponsible press agitations. A counterpoise to all such and similar influences can but be de-

sired. I shall be the first to welcome it whenever international efforts succeed in creating such a counterpoise."

A popular sentiment for war is less common, though it may be more noisy, than a popular sentiment for trying all reasonable modes of avoiding war, Such a mode would be an international court of justice.

The wreck and disorder now facing Europe and desolating every sea, when they have done their deadly work, will leave behind them new material for strengthening public opinion throughout the world in favor of the movement toward organized peace—organized through courts open to all and respected by all.

A public opinion of the world in matters of immediate and general political concern has only become possible during the last half century, because it is during that period only that the telegraph and telephone, supplemented by the Universal Postal Union, have annihilated time and enabled all nations to share the news of every day in common company. Whatever educates that public opinion toward higher levels and strengthens it in right thinking makes for justice between nations, and helps to secure it by just such methods as have been found best suited to do justice between men.

SPECIAL NOTICE.

The American Society for Judicial Settlement of International Disputes was formed in 1910 for the purpose of promoting the establishment of a judicial tribunal which would perform for the nations of the civilized world a similar service to that which is given by ordinary courts to individuals, and of encouraging recourse to such a tribunal after its establishment.

The Society has now been in existence for four years.

During this period there have been four annual conferences, the printed proceedings of which have been a valuable acquisition to libraries and to all interested in the development of judicial settlement and of international law; men of distinguished ability and unquestioned influence contributed the papers, some of which have been voluntarily translated into French, German, Italian and Spanish.

Seventeen quarterly pamphlets, each containing an appropriate monograph by some acknowledged authority on subjects tending to advance the purpose of the Society, have been issued, not only to members, but to a carefully selected list of 30,000 names, including the leading law schools and universities, throughout the world.

A copy of all publications is sent to the foreign office of every nation and to the heads of foreign legations in Washington.

There is a widespread and growing interest in the work of the Society. Hardly a day passes without requests not only from America but from many parts of the world for copies of the pamphlets, which are always sent free of charge. The Officers and Executive Committee are much gratified at the interest awakened by their efforts, but are obliged to issue an earnest appeal for contributing members in order to continue the work on the present scale.

The object of the founders of the Society was to give it a large following, and so there were three classes of membership established (Life, Sustaining and Annual), with equal privileges, leaving each member to determine what he would give, and in order that it might be beyond the reach of none, the subscription for annual membership was fixed at one dollar. At the same time, in order to obtain a more adequate income, a Sustaining Membership at ten dollars a year was established. But for the generosity of one or two members, the work could not have been brought up to its present standard. While there has been a very gratifying response to the appeals for membership, the income from this source is hardly more than enough to pay for postage and the cost of addressing envelopes.

You are therefore requested to do what you can to help the cause:

1. By sending your subscription for membership, if you are not already a member.
2. By asking your friends to become members.
3. By furnishing lists of names of residents of your community who would be likely to take an interest in the work.

Any further information will be furnished upon application to the Assistant Secretary, Tunstall Smith, "The Preston," Baltimore, Md.

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Publications of the American Society for Judicial Settlement of International Disputes

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1. The New Era of International Courts, by Simeon E. Baldwin. August, 1910.

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3. The Importance of Judicial Settlement, by Elihu Root. February, 1911.

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14. The Supreme Court of the World, by Henry B. F. Macfarland. November, 1913.

15–16. Status of the International Court of Justice, by James Brown Scott. *Double number*. February and May, 1914.

17. Justice Between Nations, by Simeon E. Baldwin. August, 1914.